PONNIAH v. LIM

[A. Cr. J. (Thomson C.J.) May 6, 1960]

[K. L. — Selangor Criminal Appeal No. 23 of 1960]

Criminal Procedure — Private prosecution — Appeal — Who is the proper respondent? — Criminal Procedure Code (Cap. 6), ss.308, 378 and 379 — Right of audience.

The appellant in this case was convicted in the Magistrate's Court at Klang for assault in contravention of section 352 of the Penal Code. The prosecution was a private one, and on appeal the preliminary point arose as to whether the proper respondent to the appeal was the complainant or the Public Prosecutor.

Held: under the Criminal Procedure Code it follows from the provisions of section 308 that the only respondent to an appeal against conviction and/or sentence of a convicted person is the Public Prosecutor and save as provided for by sections 378 and 379 no one has any right of audience.

Cases referred to:—

(1) *Murray* v. *Ooi Ah Kai*, Perak Criminal Appeal No. 99 of 1952, unreported.
(2) *Low Thow Sin* v. *R.*, [1954] M.L.J. xxiv.
(3) *Kartikram* v. *Emperor*, A.I.R. 1937 Nag. 123.
(4) *Tarapore* v. *Emperor*, A.I.R. 1942 Sind 5.
(5) *Bhulabhai* v. *Bawabhai*, A.I.R. 1940 Bom. 14.

MAGISTRATE'S CRIMINAL APPEAL.

Dato R. P. S. Rajasooria for the appellant.

Respondent in person.

Thomson C.J. (delivering oral judgment on a preliminary point): This appellant was convicted in the Magistrate's Court at Klang for assault in contravention of section 352 of the Penal Code. The prosecution was a private one, the complainant being one Mrs. Lim.

The appellant having appealed against her conviction and sentence, the preliminary point arises as to whether the proper respondent to the appeal is Mrs. Lim or the Public Prosecutor.

The point was first considered by myself in the unreported case of *Murray* v. *Ooi Ah Kai*[1] in which I held that in such circumstances the proper respondent was the Public Prosecutor.

In the later case of *Low Thow Sin* v. *Reg.*[2] Spenser Wilkinson J., as he then was, took the contrary view. That case, too, was not reported, but a note of it is to be found in the Malayan Law Journal for 1954 (at page xxiv). It would appear from this brief note that in that case my own decision in *Murray's* case was not quoted and indeed it would seem that there was not a great deal of controversy because all parties would appear to have been in agreement that the original complainant should be substituted for the Crown as respondent.

With great respect for the present Chief Justice of Nyasaland I am compelled on reflection to adhere to my own earlier decision.

To my mind the question can be determined by reference to section 308 of the Criminal Procedure Code which provides that in the case of an appeal from the decision of a Magistrate copies of the record are to be transmitted to the Public Prosecutor and to the appellant. That section is to be considered not only within its own four walls but also in the light of certain statements of principle by the Courts in India.

In the first place, I would refer to the judgment of Mr. Justice Bose in the case of *Kartikram* v. *Emperor*[3]. Having dealt in detail with certain sections of the Indian Code, His Lordship went on to observe:—

> "The interests of the Crown and the complainant are not always the same. Private parties often wish to serve their own private ends, and criminal proceedings are not primarily designed for that. It would be unfortunate to allow private passions and prejudices to creep into the conduct of a criminal trial, when it can be avoided. It would be even more undesirable to leave the matter in two sets of hands with a possible conflict of interests; undesirable generally from the broad viewpoint of public policy, undesirable also because it would be unfair to the accused. Therefore, if the other side is properly represented by the Crown, not only has the complainant no right of audience, but ordinarily he should not be allowed to appear at all."

I would then refer to the judgment of the Chief Justice of Sind, Mr. Justice Davis, in *Tarapore* v. *Emperor*[4]. Again, I am not concerned with His Lordship's examination of the sections of the Indian Code involved in that case but having completed that examination, His Lordship made the following observations:

> "In an appeal the case has proceeded from a trial to a conviction. The Crown is now directly concerned in the case. The accused is no longer under trial. He has become a convicted person. The Crown is responsible for carrying out the sentence passed by the Court. Furthermore, the Public Prosecutor stands not necessarily for conviction but for justice, and it would be affectation to pretend that an advocate for a complainant appearing for a complainant, vitally affected, as is alleged in this application, in maintaining the conviction, would present the case before the Court in the same manner as a Public Prosecutor who has not the same personal interest in the case."

Finally, I would refer to Sir John Beaumont's judgment in the case of *Bhulabhai* v. *Bawabhai*[5]. That case is of particular importance because His Lordship confined his examination of the Indian Code to section 422. I am aware that section 422 of the Indian Code is not word for word the same as any section in our Code but the relevant portion of it is very similar to the provisions of our section 308. Having referred to section 422, His Lordship went on to say:—

> "In my opinion, nobody but the Crown is entitled to be heard, because no private citizen is technically interested in upholding a conviction."

Approaching the matter in the light of these statements of principle which, although technically they are not binding upon me, I adopt, I have no hesitation in saying that under our Code it follows from the provisions of section 308 that the only respondent to an appeal against conviction and/or sentence of a convicted person is the Public Prosecutor and that save as provided for by sections 378 and 379 no one has any right of audience.

I think the proper course here is to make an order striking out Mrs. Lim as the respondent, substituting as respondent the Public Prosecutor and ordering service on him.

Order accordingly.